

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1029 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?

4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge? : NO

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BHIMSHI DEVA BAROT

Versus

KUTCH GRAMIN BANK

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Appearance:

MR CH VORA for Petitioner  
MR PRASHANT G DESAI for Respondent No. 1

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CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 23/03/2000

ORAL JUDGEMENT

The petitioner in this revision application filed  
under sec. 115 of the Code of Civil Procedure, 1908, was  
the judgment debtor before the Learned Civil Judge (JD)  
at Mundra, in district Kutchh in Execution Petition No.  
23/1993

The respondent being the judgment creditor, filed an application Exh. 39-D in the aforesaid execution petition against the petitioner stating that the amount of Rs. 63,431/- was due to the respondent-bank and the petitioner has not been paying the said amount and, therefore, the petitioner be detained in civil prison. The application was made on 26.6.1996. It appears that the present petitioner was present in the court and he was heard by the court on that very day and on that very day the court passed the order. The petitioner who was present in the court stated that he is unable to pay the amount of decree and he has no property. In view of the above position, the trial court directed that the present petitioner be detained in civil prison till the full amount is paid by him.

Feeling aggrieved by the said order of the trial court, the petitioner has preferred this revision application before this court. The matter was admitted and the learned advocate for the respondent has made appearance also.

I have heard the learned advocates for the parties and have perused the papers.

Now, it is very clear that the judgment creditor submitted an application for detaining the petitioner in civil prison and on hearing the petitioner, the trial court straight-way passed an order that the petitioner be detained in civil prison.

Obviously, the application made by the judgment creditor was under Order 21, Rule 37 of the Code of Civil Procedure. It would be necessary to consider the provisions made thereunder and, therefore, it may be reproduced hereinbelow.

37.(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court shall, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison.

Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.

There is further provision in Order 21, Rule 40, which may also be reproduced for ready reference, which reads as under:

- 40.(1) When a judgment-debtor appears before the court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.
- (2) Pending the conclusion of the inquiry under sub rule(1) the Court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required.
- (3) Upon the conclusion of the inquiry under sub-rule(1), the Court may, subject to the provisions of section 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest.

Another important provision to be considered for the purpose of deciding the application for arrest in execution of a decree can be found in section 51 of the Code of Civil Procedure, which reads as follows:

51. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree-

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison [for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section];
- (d) by appointing a receivier; or
- (e) in such other manner as the nature of the relief granted may require:

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied-

- (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,-
  - (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or
  - (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or
- (b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or
- (c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation: In the calculation of the means of the judgment-debtor for the purposes of clause(b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

The cumulative effect of the aforesaid provision makes it clear that the Court is obliged to issue notice to show-cause to the judgment-debtor and, thereafter the judgment-debtor is required to be given an opportunity of being heard. Moreover, the notice can be dispensed with only on the consideration shown in the aforesaid provision, therefore, in all cases, notice cannot be dispensed with but at the same time, notice can be dispensed with if the requirement of Rule 37 Order 1 are satisfied.

If we go through the order of the trial court, it becomes clear that the trial court has not recorded a satisfaction with respect to the existing circumstances for dispensing with the notice to the judgment-debtor before passing of order of detention.

As stated above, section 51 of Code of Civil Procedure is relevant consideration and, if we go through the order of the trial court it becomes clear that the requirement of section 51 of CPC has not been satisfied and the trial court has not recorded a satisfaction with respect to the existence of requirement of section 51 of the Code of Civil Procedure.

Under the aforesaid circumstances, it is very clear that the court has not followed the proper procedure before passing the order of detention of the petitioner.

It, therefore, becomes clear that the court has acted with material irregularity relating to the jurisdiction and, therefore, it is necessary to interfere with the order of the trial court.

On this aspect, it would be relevant to consider the decision in the case of Koli Lambhabhai Bhanabhai & Anr. vs. Shukla Harilal Narmadashanker, reported in 1990(1) GLR, p. 50. There also the provisions contained in section 51 have been considered by this Court even the decision of the Supreme Court has also been considered. There it has been clearly laid down that the court is

required to follow the procedure laid down in section 51 of Code of Civil Procedure and in Order 21 Rule 37 of Code of Civil Procedure.

It is, therefore, clear that without following the aforesaid provisions, the order has been passed by the trial court. It deserves to be set aside as being illegal and passed with material irregularity with respect to the jurisdiction of the Court.

In the aforesaid view of the matter, this revision application is allowed. The order passed by the Executing Court on 26.6.1996 below Application Exh. 39-D in Execution Petition No. 23/1993 is set aside. The matter is ordered to be remanded back to the trial court for further proceedings in accordance with law. Rule is made absolute to the aforesaid extent only.

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